mesyuarat yang disebut itu. Sipemohon adalah seorang ahli koperat yang terkenal di negara ini dan pada pendapat saya beliau tidak akan mensia-siakan kedudukan beliau dengan melarikan diri sekiranya pasport dilepaskan kepadanya buat sementara.

Oleh yang demikian saya benarkan permohonan beliau dan mengarahkan pasport antarabangsanya diserahkan kepadanya untuk perjalanan beliau ke Jakarta sahaja bagi tempuh 18 Julai 1990 hingga 23 Julai 1990 dan beliau dikehendaki menyerahkan balik pasport tersebut ke mahkamah 48 jam selepas kembalinya ke Malaysia.

Permohonan dibenarkan.

Peguamcara: *Shearn Delamore & Co.*

Dilaporkan oleh *Zarinah Marican*

Re V David, ex p United Asian Bank Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO 1369 OF 1985
ZAKARIA YATIM J
15 OCTOBER 1990

Bankruptcy — Defective petition — Attestation clause missing — Petition signed by solicitor instead of petitioner — Sealed copy not served — Whether proceedings are invalid due to irregularity — Bankruptcy Act 1967, s 131 — Bankruptcy Rules 1969, rr 99(1), 109 & Form 9

The judgment creditor commenced bankruptcy proceedings against the judgment debtor. At the hearing of the petition, it was submitted for the judgment debtor that the petition was defective in that a clause as to attestation was omitted from the petition; the petition was wrongly signed by the petitioner's attorney, not the petitioners themselves; and a sealed copy of the petition was not served on the judgment debtor. The judgment creditor submitted that this was a mere irregularity and did not invalidate the proceedings.

Held, dismissing the petition:

(1) Rule 99(1) of the Bankruptcy Rules 1969 requires that when a petition is signed by the judgment creditor, it must be done in the presence of a witness. This rule should be strictly construed. The absence of the words 'signed by the petitioner in my presence ...' shows that the creditor's petition was not signed in the presence of the witness.

(2) In the petition, the judgment creditor asks for receiving and adjudication orders, but yet the petition was signed by the attorney as petitioner. There is nothing in the creditor's petition that the attorney is authorized by the judgment creditor to sign the petition. There is also no evidence that the attorney is acting under a valid power of attorney. As such the person who signed the petition was not lawfully authorized to sign the petition, thus rendering the petition defective.

(3) As to the non-service of a sealed copy of the petition on the judgment debtor, the judgment creditor conceded that only a 'true copy' was served. As the Bankruptcy Rules 1969 require a sealed copy to be served, the service of the petition is defective.

(4) As to whether the bankruptcy proceedings are invalid because of these defects, it must be considered whether substantial injustice has been caused by these defects, and that the injustice cannot be remedied by any order of court. In view of the facts, the defects are serious and substantial injuries would be caused by these defects. The petition is, as such, dismissed with costs.

[Bahasa Malaysia summary

Pemiutang penghakiman telah memulakan tindakan kebankrapan terhadap penghutang debtor. Di pembicaraan petisyen itu, hujah dibuat bagi penghutang penghakiman bahawa petisyen itu cacat kerana fasal pengakusaksian telah ditinggalkan daripada petisyen itu; petisyen itu telah ditandatangani dengan salah oleh peguamcara pempetisyen, bukan pempetisyen sendiri; dan satu salinan petisyen itu yang dimeterai tidak disampaikan kepada penghutang penghakiman. Pemiutang penghakiman menghujah bahawa ini adalah luar aturan semata-mata dan tidak menjadikan tindakan itu tidak sah.

Diputuskan, menolak petisyen itu:

(1) Kaedah 99(1) Kaedah-Kaedah Kebankrapan 1969 mewajibkan supaya bila satu petisyen ditandatangani oleh penghutang penghakiman, ia mesti dibuat di hadapan seorang saksi. Kaedah ini mesti ditafsirkan dengan tegas. Ketiadaan perkataan-perkataan 'ditandatangani oleh pempetisyen di hadapan ...' menunjukkan bahawa petisyen pemiutang tidak ditandatangani di hadapan seorang saksi.

(2) Di dalam petisyen itu, pemiutang penghakiman memohon perintah penerimaan dan penghukuman, namun petisyen itu ditandatangani oleh peguamcaranya sebagai pempetisyen. Tidak ada apa-apa di dalam petisyen pemiutang yang menunjukkan bahawa peguamcara itu diberi kuasa oleh pemiutang untuk menandatangani petisyen itu. Juga tidak ada keterangan bahawa peguamcara itu bertindak di bawah surat kuasa wakil yang sah. Oleh itu, orang yang menandatangani petisyen itu tidak diberi kuasa di sisi undang-undang untuk menandatangani petisyen itu, dengan itu menyebabkan petisyen itu cacat.

(3) Berkenaan dengan ketiadaan penyampaian satu salinan termeterai petisyen itu kepada penghutang, pemiutang mengaku bahawa hanya satu 'salinan benar' disampaikan. Memandangkan yang Kaedah Kebankrapan 1969 mewajibkan satu salinan termeterai disampaikan, penyampaian petisyen itu cacat.

(4) Berkenaan soalan sama ada tindakan kebankrapan itu tidak sah kerana kecacatan itu, mestilah dipertimbangkan sama ada ketidakadilan yang besar telah diakibatkan oleh kecacatan itu, dan bahawa ketidakadilan itu tidak boleh diperbaiki oleh apa-apa perintah mahkamah. Memandangkan fakta-fakta itu, kecacatan itu adalah serius dan ketidakadilan yang besar akan diakibatkan oleh kecacatan itu. Petisyen itu ditolak dengan kos.]

Case referred to

1 *Low Mun* v *Chung Khiaw Bank Ltd* [1988] 1 MLJ 263 (folld)

Legislation referred to

Bankruptcy Act 1967 s 131
Bankruptcy Rules 1969 r 99(1), 109, Form 9

MS Murthi for the judgment debtor.
KL Rekhraj for the judgment creditor.

Cur Adv Vult

Zakaria Yatim J: In this creditor's petition, the judgment creditor, the United Asian Bank Bhd, is asking the court to make receiving and adjudication orders against the judgment debtor on the ground that the judgment debtor has committed an act of bankruptcy, namely, the judgment debtor failed to comply with the requirements of the bankruptcy notice.

At the hearing of the petition, Mr Murthi, counsel for the judgment debtor, submitted that the creditor's petition was defective. According to him the words 'signed by the petitioner in my presence ...' as contained in Form 9 were not included in the petition. I have examined the creditor's petition and I find those words are not written in the petition. At p 2 of the creditor's petition there is the signature of the judgment creditor's attorney and the 'signature of witness', Mr Kesturi Lal Rekhraj, an advocate and solicitor, Kuala Lumpur. There is also the address of Messrs Rekhraj Zaitoon & Associates, a firm of advocates and solicitors.

Rule 99(1) of the Bankruptcy Rules 1969 clearly states that 'Every petition shall be dated, signed and witnessed'. Under the rule when the petition is signed by the judgment creditor it must be done in the presence of the witness. The absence of the words 'signed by the petitioner in my presence ...' shows that the creditor's petition was not signed in the presence of the witness. In my view the creditor's petition is defective in that it fails to comply with r 99(1) and Form 9. Rule 99(1) should be construed strictly. In *Low Mun* v *Chung Khiaw Bank Ltd*,[1] the Supreme Court said '... since bankruptcy is entirely a creation of statute law, the rule of strict construction should be applied to the legislative words creating the act of bankruptcy ...'.

Mr Murthi further submitted that the creditor's petition was signed by the judgment creditor's attorney. In the creditor's petition it is the judgment creditor who asks the court to make receiving and adjudication orders against the judgment debtor. Paragraph 1 of the creditor's petition states:

> We, United Asian Bank Bhd, a company incorporated in the States of Malaya and having our registered office at Menara UAB, Jalan Tun Perak, Kuala Lumpur in the Federal Territory and a place of business among other places at Wisma MCIS, Jalan Barat, Petaling Jaya, hereby petition the court that receiving and adjudication orders may be made in respect of the moveable and immovable estate of V David.

The paragraph quoted above does not state that the creditor's petition is issued by an attorney on behalf of the judgment creditor. At p 2 of the creditor's petition it is signed by the attorney as the petitioners. There is nothing in the creditor's petition that the attorney is authorized by the judgment creditor to sign the petition. There is also no evidence that the attorney is acting under a valid power of attorney. The court is not satisfied that the person who signed the petition is lawfully authorized by the judgment creditor to sign the petition. On this ground too the creditor's petition is defective.

The next point raised by Mr Murthi was that the judgment creditor did not serve a sealed copy of the creditor's petition on the judgment debtor. He referred to the affidavit of service affirmed by a clerk employed by Messrs KL Rekhraj Zaitoon and Associates. The affidavit merely states that 'a true copy' of the creditor's petition was served personally on the judgment debtor who acknowledged receipt of the petition. Mr Murthi said that the affidavit of service merely mentioned 'a true copy' of the creditor's petition and not a sealed copy. Mr Rekhraj, counsel for the judgment creditor, conceded that the affidavit of service mentioned only 'a true copy' and not a sealed copy. He submitted that it was only a formal defect or a mere irregularity and did not invalidate the bankruptcy proceeding. Rule 109 of the Bankruptcy Rules 1969 states:

> A creditor's petition shall be personally served and service shall be effected by an officer of the court or by the creditor or his solicitor or a person in their employment by delivering a *sealed copy* of the petition to the debtor. (Emphasis added.)

3 *Halsbury's Laws of England*(4th Ed) at p 201 states: 'A creditor's petition must be personally served by delivering to the debtor a sealed copy of the filed petition ...'.

It is clear that the creditor's petition and the service of the petition are defective. The question here is whether the bankruptcy proceeding is invalid because of these defects. Section 131 of the Bankruptcy Act 1967 states:

> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the Court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that Court.

What the court has to consider now is whether substantial injustice has been caused by these defects and that the injustice cannot be remedied by any order of this court. In my opinion, in the absence of any proof, the creditor's petition was not signed by a person authorized by the judgment creditor. Furthermore the petition does not state that it was signed by that person in the presence of a witness. These are serious defects and substantial injustice would be caused by these defects. The injustice cannot be remedied by any order of this court.

In the circumstances, I order that the petition be dismissed with costs.

Petition dismissed.

Solicitors: *Murthi & Partners; Syarikat KL Rekhraj.*

Reported by *Azra Moiz*